



## DEPARTMENT OF HEALTH & HUMAN SERVICES

Food and Drug Administration  
Rockville MD 20857

Re: Emend for Injection

Docket No. FDA-2009-E-0057

**FEB 26 2009**

The Honorable Jon Dudas  
Under Secretary of Commerce for Intellectual Property  
Director of the United States Patent and Trademark Office  
Mail Stop Hatch-Waxman PTE  
P.O. Box 1450  
Alexandria, VA 22313-1450

Dear Director Dudas:

This is in regard to the application for patent term extension for U.S. Patent No. 5,691,336 filed by Merck & Co., Inc., under 35 U.S.C. § 156. The human drug product claimed by the patent is Emend for Injection (fosaprepitant meglumine), which was assigned new drug application (NDA) No. 22-023.

A review of the Food and Drug Administration's official records indicates that this product was subject to a regulatory review period before its commercial marketing or use, as required under 35 U.S.C. § 156(a)(4). Our records also indicate that it represents the first permitted commercial marketing or use of the product, as defined under 35 U.S.C. § 156(f)(1), and interpreted by the courts in *Glaxo Operations UK Ltd. v. Quigg*, 706 F. Supp. 1224 (E.D. Va. 1989), *aff'd*, 894 F. 2d 392 (Fed. Cir. 1990).

The NDA was approved on January 25, 2008, which makes the submission of the patent term extension application on March 21, 2008, timely within the meaning of 35 U.S.C. § 156(d)(1).

Should you conclude that the subject patent is eligible for patent term extension, please advise us accordingly. As required by 35 U.S.C. § 156(d)(2)(A) we will then determine the applicable regulatory review period, publish the determination in the *Federal Register*, and notify you of our determination.

Please let me know if we can be of further assistance.

Sincerely yours,

Jane A. Axelrad  
Associate Director for Policy  
Center for Drug Evaluation and Research

cc: J. Eric Thies  
Merck & Co., Inc.  
Patent Department  
P.O. Box 2000  
Rahway, NJ 07065-0907